(8)

No. 87-1169

In the Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL BEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether petitioner's theft of a government-owned tape recorder from a government informant constituted a theft of government property in violation of 18 U.S.C. 641.

2. Whether the timing of the government's issuance of a grand jury subpoena or the government's payments to an informant violated petitioner's due process rights.

3. Whether petitioner's conviction on one count must be reversed on the ground that it was inconsistent with his acquittal on two other counts.

4. Whether petitioner is entitled to a new trial because of the absence of an entrapment instruction.

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OPINION

The opinion of the court of appeals (Pet. App. A4-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for a writ of certiorari was filed on December 4, 1987, but was not served on the government until January 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 23, 1986, a six-count indictment was returned in the United States District Court for the Eastern District of Tennessee charging petitioner with three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); bribery of a prospective government

witness, in violation of 18 U.S.C. 201(d); obstruction of justice, in violation of 18 U.S.C. 1510; and theft of government property having a value in excess of $100, in violation of 18 U.S.C. 641. See C.A. App. 23-26.[1] Following a jury trial, petitioner was found guilty of theft of government property, but he was acquitted on the remaining counts. He was fined $500 and sentenced to a term of three years' imprisonment, all but five months and twenty-nine days of which was suspended in favor of probation (*id.* at 59). The court of appeals affirmed in a brief per curiam opinion (Pet. App. A4-A5).

2. At trial, the government established that in 1985 the Federal Bureau of Investigation was investigating allegations that petitioner and others were involved in the distribution and use of cocaine. Janet Morgan, one of the individuals allegedly involved in the drug activities, agreed to cooperate with the FBI and allowed the FBI to record several conversations she had with petitioner in person and on the telephone (C.A. App. 230). On the last of those occasions, petitioner asked Morgan whether she was recording their conversation (*id.* at 319). When she denied it, petitioner stated that he had a detection device in his pocket that indicated that she was carrying a recorder (*ibid.*). When Morgan refused petitioner's request to look into her purse, he forcibly took the purse from her and found the recorder inside (*id.* at 320). Petitioner then left with the recorder, even though Morgan told him it belonged to the FBI (*id.* at 320-321). Morgan immediately notified the FBI that petitioner had taken the recorder (*id.* at 321-322), and an FBI agent stopped petitioner's car a short time later. Upon demand, petitioner surrendered the recorder to the agent (*id.* at 780-782).

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[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the evidence does not support his conviction under 18 U.S.C. 641 for theft of government property because he "uncovered the recorde[r] with the mistaken belief that it [belonged to] Janet Morgan" (Pet. 7) and because he intended to return the recorder once he had listened to the tape (*id.* at 8). Petitioner's claim lacks merit on both accounts.

First, it is irrelevant whether petitioner mistakenly believed that the recorder belonged to Morgan. As the courts of appeals have consistently held, a violation of 18 U.S.C. 641 does not require knowledge that the stolen property belongs to the government. See, *e.g.*, *United States* v. *Scott*, 789 F.2d 795, 798 n.2 (9th Cir. 1986); *United States* v. *Baker*, 693 F.2d 183, 186 (D.C. Cir. 1982); *United States* v. *Speir*, 564 F.2d 934, 938 (10th Cir. 1977), cert. denied, 435 U.S. 927 (1978); *United States* v. *Jermendy*, 544 F.2d 640 (2d Cir. 1976), cert. denied, 430 U.S. 909 (1977). Cf. *United States* v. *Feola*, 420 U.S. 671 (1975).

Nor was the evidence insufficient to support the jury's conclusion that petitioner intended to deprive the government of its property permanently. The trial court properly instructed the jury that the taking must be accomplished "with intent to deprive the owner of [the property's] use or benefit, and that means permanently, as opposed to temporarily" (C.A. App. 689). The jury heard petitioner's denial that he intended to steal the recorder (see *id.* at 480-481), but it was apparently persuaded to the contrary by the evidence that petitioner forcibly took the recorder from Morgan and that he surrendered the recorder only after being stopped by a federal agent who demanded its return (see *id.* at 319-322, 780-782).

2. Petitioner also argues (Pet. 9-13) that his conviction should be reversed because the government engaged in misconduct by issuing a "sham" grand jury subpoena to Morgan and by paying her a fee contingent on the value of her cooperation in the case. There is no substance to either claim.

Contrary to petitioner's assertion, the government did not seek the issuance of a subpoena to Morgan on October 8, 1985, for the "sham" purpose of inducing petitioner to commit the bribery and obstruction of justice offenses charged in Counts 1 and 2 of the indictment. As the FBI agent testified at trial (C.A. App. 859-860), the subpoena was issued at that time to afford Morgan, who appeared as a witness before the grand jury on October 22, 1985, and again in April 1986 (see *id.* at 328, 423, 859), "some cloak of Federal protection" in the event that she was threatened or harmed (*id.* at 859-860). The subpoena was therefore issued for a proper purpose—to compel Morgan's appearance. The timing of the issuance of the subpoena served an equally proper purpose—to extend to the witness the protections of federal law. The issuance of the subpoena therefore did not constitute prosecutorial misconduct. And even if the subpoena had been issued for a "sham" purpose, petitioner would not have had any ground for relief. See *United States* v. *Martino*, 825 F.2d 754, 759-762 (3d Cir. 1987) (permissible to issue "sham" subpoena under a pseudonym to protect the identity of an undercover agent).[2]

There is likewise no merit to petitioner's claim that Morgan was improperly compensated under a contingent fee arrangement. The government established at trial that

[2] In *Martino*, the Third Circuit reversed the district court's decision in *United States* v. *Caputo*, 633 F. Supp. 1479, motion for reconsideration denied, 641 F. Supp. 378 (E.D. Pa. 1986), upon which petitioner exclusively relies (see Pet. 10).

Morgan was not paid any money contingent on her testimony. The FBI agent responsible for the payments to Morgan testified that the government paid Morgan's telephone bill and also made several $100 payments to her to pay for her security and for her travel out of town on occasions when petitioner expected her to be visiting her husband in Florida (C.A. App. 885-886). Morgan's trial testimony did not contradict that account (see *id.* at 301, 315-316, 322-323, 327-330).

In any event, petitioner mistakenly relies on the Fifth Circuit's panel decision in *United States* v. *Cervantes-Pacheco*, 800 F.2d 452 (1986), in claiming that contingent fee arrangements violate due process. The Fifth Circuit, sitting en banc, subsequently reversed that panel opinion by a vote of 12 to 2 (826 F.2d 310 (1987), and this Court recently denied certiorari in that case. See *Nelson* v. *United States*, No. 87-656 (Jan. 19, 1988). As we demonstrated in our brief in opposition in *Nelson*,[3] due process principles are in no manner violated by compensating informants for their cooperation on a contingency basis.

3. Petitioner contends (Pet. 13-19) that his conviction for theft of government property should be reversed because it is inconsistent with his acquittals on two other counts alleging bribery and obstruction of justice. In the first place, however, the jury verdicts were not inconsistent. At trial, petitioner asserted an entrapment defense to the charges of bribery and obstruction of justice, and he defended against the theft charge on the ground that he did not intend to deprive the government of its property on a permanent basis. The jury therefore could have decided that petitioner was indeed entrapped with regard

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[3] We are providing petitioner with a copy of our brief in opposition in *Nelson*.

to the bribery and obstruction of justice charges, or that he lacked the intent to commit those offenses, but that he acted with the requisite criminal intent when he took the tape recorder.

In any event, even if the verdicts were inconsistent, that would not warrant reversal. As this Court explained in *United States* v. *Powell*, 469 U.S. 57, 65-66 (1984), inconsistent verdicts are not reviewable because "inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." Contrary to petitioner's unsupported assertion (Pet. 14), there is no reason to apply a different rule when an entrapment defense is raised.[4]

4. Finally, petitioner contends (Pet. 19-20) that he should have been allowed both to deny the commission of

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[4] Neither of the two cases upon which petitioner relies (Pet. 14-19), *United States* v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 471 U.S. 1065 (1985), and *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), is relevant to petitioner's inconsistent defense claim. Neither even involved a claim based on inconsistent verdicts. *Waterman* was exclusively concerned with the distinct question whether a government agreement to reward a witness based on the success of the prosecution was valid. *Twigg* addressed the issue whether the evidence produced in that case supported an entrapment defense. The panel decision in *Waterman*, moreover, was subsequently vacated by an evenly divided en banc court (see 732 F.2d at 1533), and the Third Circuit has since questioned whether *Twigg* is consistent with this Court's decision in *Hampton* v. *United States*, 425 U.S. 484 (1976). See *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *United States* v. *Jannotti*, 673 F.2d 578, 610 n.17 (3d Cir.) (en banc), (concurring opinion), cert. denied, 457 U.S. 1106 (1982).

the offense and to assert the defense of entrapment. It is now settled that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews* v. *United States*, No. 86-6109 (Feb. 24, 1988), slip op. 4. Petitioner, however, never requested that an entrapment instruction be given with respect to the theft charge. Nor did petitioner object to the absence of an entrapment instruction on that count at the conclusion of the district court's jury charge. See C.A. App. 650-681, 689. Hence, petitioner is entitled to relief now only if the absence of an instruction amounts to plain error that "seriously affected 'substantial rights.' " See *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985); Fed. R. Crim. P. 30.

The absence of an entrapment instruction on the theft charge in this case was not error at all, let alone plain error. A defendant seeking an entrapment instruction must adduce sufficient evidence to show that he lacked predisposition and that he was induced by the government to commit the offense (see *Mathews*, slip op. 4-5, 8). Petitioner made no such showing here; nor could he have. The evidence at trial refuted any possible argument that the government induced petitioner to steal the tape recorder and that petitioner lacked the predisposition to commit the crime. The tape recorder was hidden in Morgan's purse, where petitioner would not discover it. Petitioner used a detection device to locate the recorder and forcibly removed it from Morgan's possession. There was not the slightest suggestion in the evidence that petitioner was somehow pressured or coerced into engaging in that conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60337